

**U.S. DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K STREET, NORTHWEST, SUITE 400
WASHINGTON, DC 20001-8002**

DATE: 10/03/96

CASE NO. 95-INA-114

In the Matter of:

ASE CHARTERS, INC.
Employer

on behalf of

ELIZABETH U. AGUILAR
Alien

Before: Guill, Vittone and Wood
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer (CO) of an application for alien labor certification. The certification of aliens for permanent employment in the United States is governed by §212 of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A) and Title 20, Part 656 of the Code of Federal Regulations (C.F.R.). Unless otherwise noted, all regulations cited in this decision refer to Title 20.

We base our decision on the record upon which the CO denied certification and the Employer's request for review as contained in the appeal file (AF) and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

The Employer filed an *Application for Alien Employment Certification* (ETA 750A) on March 8, 1993 to permit it to employ the Alien permanently as a Controller with the following duties:

“ADVISES THE CHIEF EXECUTIVE OFFICER ON THE FINANCIAL
AFFAIRS OF THE CORPORATION. PREPARES FINANCIAL ANALYSIS

OF OPERATIONS FOR GUIDANCE OF MANAGEMENT . PREPARES REPORTS WHICH OUTLINE COMPANY INCOME, EXPENSE AND EARNINGS BASED ON PAST, PRESENT AND FUTURE OPERATIONS. EVALUATES NEED FOR PROCUREMENT OF FUNDS AND INVESTMENT OF SURPLUS. PREPARES POLICIES AND PROCEDURES FOR ACCOUNT COLLECTIONS AND EXTENSION OF CREDIT TO CUSTOMERS. PREPARES TAX RETURNS AND OTHER GOVERNMENT REPORTS.”

The Employer identified the nature of its business as a Limousine Service, Charter Transportation and its address as 3350 Ashley Street, #200, Ontario, California. It noted further in the ETA 750A that it required any U.S. applicant for the position to have a Bachelor’s degree in Business Sciences; either 5 years experience in the job offered, 5 years experience in a senior position in financial analysis, accounting or auditing, or a MBA or post-graduate degree; at least one year in a supervisory position over other accounting professionals; and proficiency in computerized accounting such as Lotus 1-2-3 and Accpac plus. The “Number of Employees Alien will Supervise” was noted to be “2.” The rate of pay for the position was stated on the initial ETA 750A as \$33,000.00 per year.

In a *Statement of Qualifications of Alien* (ETA 750B), executed by the Alien under penalty of perjury on December 10, 1992, she reported that she had both a Bachelor’s and Master’s degree in Business Administration and was presently in the United States under a H-1 visa. In item 15 of the statement, which calls for a list of all jobs held by the Alien during the past 3 years, she reported that she had been employed by the Employer at 3350 Shelby Street # 200, Ontario, California as an Accountant since September 1992 and had been employed from October 1989 to September 1992 as a Staff Accountant for a Certified Public Accountant in Huntington Beach, California. Other experience reported was as an Accountant and Controller from 1980 to 1988 in her native country. She did not indicate in her description of her duties in each of these positions that they involved supervision of any other employees.

On April 29, 1993, the California Employment Development Department (EDD) unit responsible for the initial processing of the application, advised the Employer that the prevailing wage for the position of Controller was \$48,900.00 per year. It also inquired at that time as to the nature of the Alien’s supervisory duties, including the job duties of the workers being supervised. The Employer responded on June 9, 1993, by amending the ETA 750 A to show \$48,900.00 per year as the wage it was offering. It reported at the same time that the Alien’s duties include supervision of workers in the Accounting Department and that such workers included a Bookkeeper and Administrative Assistant.

The Employer proceeded to advertise the position for three days on and about July 13, 1993. The advertisement noted that the job site/interview was in Ontario, California. On July 20, 1993, the EDD referred 12 resumes, which it had received as the result of the advertisement, to the Employer at 3350 Ashley Street, #200, Ontario, California. Using this same address, two additional resumes was sent to the Employer on July 22, and two more were sent on

July 26, 1993. Two resumes were then sent to the Employer at 3350 Shelby Street, #200, 3350 Shelby Street, Ontario, California on July 29, 1993 and a final resume was sent to it at this address on August 17, 1993.

In a memorandum of record, dated August 27, 1993, the EDD noted that upon its letter containing the 12 resumes being returned as “undeliverable” by the Ontario postal officials, it was discovered that the address furnished by the Employer on the ETA 750A was in error and that the correct address was on Shelby Street. It noted further that its records showed that Suite 200 at 3350 Shelby was listed to an architectural firm but that there were several other businesses that use this address as their own. Other information developed during the EDD investigation included the following:

1. The California Public Utilities Commission indicated that the Employer does not pay workers' compensation insurance premiums and therefore is prohibited by law from having any employees
2. The phone number listed on the ETA 750A was answered by an answering service who was unfamiliar with the nature of the Employer's business.
3. There is a listing for ASE Charters in the Downey area yellow pages but not in those covering the Ontario area.
4. The address provided to EDD by the Employer when registering their business with them was 19316 Harvest Avenue, Cerritos, a 1170 square foot, single family residence, owned by the Employer's president, Floreliza V. Eleazar.
5. EDD reports from the Employer show that they have four to five full time employees with average quarterly earnings of \$3,000.00 to \$5,000.00 dollars.
6. The Employer reported having paid the Alien only \$3,000 per quarter.
7. The Alien had three quarters of substantial earnings after September 1992 from the CPA firm which she had reported leaving at that time.
8. She also had wages of \$5,000.00 to \$6,000.00 per quarter working for an oriental rug company in Santa Monica for three quarters including October, November and December, 1992.

The Employer filed a Recruitment Report on September 20, 1993. Of the 19 applicants for the position, 14 reportedly did not show up for appointments scheduled for each of them on September 17, 1993 by letters dated September 13, 1993. These applicants included Douglas Stephenson, Alex Do, Charles Hatala and Bruce Palmore. The remaining applicants were rejected for not having the required Bachelor's degree in business sciences, for not having the prerequisite

work experience and/or by demonstrating a lack of respect for authority during her interview.

In response to a questionnaire sent by the CO's office, Palmore reported that he did not remember ever hearing from the Employer. Stephenson reported that he did not receive the letter inviting him to the interview until the day it was scheduled and that the Employer never responded to his request for a new interview date. Do stated that the letter inviting him to the interview appeared to be a "fake one" as the interview date had already passed when he received it. He noted further that the Employer did not respond to his call. Hatala responded to the effect that he considered the Employer's only contact to be very poor, and in any event it was not received until the night of July 17, 1993.

The CO issued a Notice of Findings (NOF) on January 7, 1994 in which he proposed to deny certification because of the following deficiencies:

I. Non-existent Business or Job Opening. In substance, the CO noted in this regard that §656.50 of the regulations require an employer to establish that it currently has a location within the United States at which it proposes to employ a full-time worker and that there is some question as to whether such an opening exists in this case. He indicated that he was basing such question on the information supplied by the EDD regarding the confusion in its business address, its reported lack of workers' compensation insurance, and that the wages it reports "are less than the wage you are offering the alien." The Employer was instructed to submit documentation of an on-going business and a current unfilled job opening such as a business license and Federal and State income and business tax returns.

II. Rejection of Qualified U.S. Workers. Citing §656.21(b), the CO opined that it appeared that two of the applicants were rejected for other than lawful, job-related reasons as the Employer had not adequately explained why they were not qualified for the position. Citing §656.24(b)(2)(ii), the CO noted further that the three other applicants rejected by the Employer showed combinations of education, training and/or experience enabling them to perform the usual requirements of the occupation.

III. Lack of Good-faith Effort to Recruit Applicants. Citing decisions of the Board which hold that an employer has the burden of showing a good-faith effort to recruit applicants, the CO noted, in effect, that the Employer had not complied with this requirement because it did not schedule interviews until four to eight weeks after resumes had been referred to it by EDD. He noted that Palmore had reported not having been contacted by the Employer and that Stephenson, Do and Hatala reported that the letter from the Employer came on the same day or after the date of the interview and that the Employer had refused to reschedule the same. The Employer was instructed that if they contend this conclusion is

inaccurate, they should submit a rebuttal giving details of their attempt(s) to interview the U.S. applicant(s).

The Employer filed its rebuttal on February 10, 1994 by submitting documentation to the effect that it operated as the sole proprietorship of Antonio S. Eleazer, doing business under the name of Airport Shuttle Express, until July 1992 when it became incorporated as ASE Charters, Inc., with Flordeliza Eleazer as its President and Chief Financial Officer and Antonio Eleazer as its Secretary. Income tax returns were submitted for the year 1992 which show that during the period it was operated as the sole proprietorship of Antonio Eleazer it had gross receipts of \$173,615.00 and expenses of \$178,803.00, which included wages of \$25,234.00. The corporation reported that for the period it operated in 1992 it had gross receipts of \$128,633.00 with expenses of \$128,664.00, which included wages of \$24,400. An interim financial report for the corporation for the year ending December 31, 1993 was included in the rebuttal. This showed income for the year of \$318,991 and expenses of \$280,795 of which \$42,690.00 reportedly represented salaries and wages.

Other documentation submitted with the rebuttal included the following:

1. A permit issued to ASE Charters, Inc. by the Public Utilities Commission of California, on June 23, 1993 authorizing it to transport "property" for compensation.
2. A copy of a Business License to operate "Transportation Services" issued by the City of Cerritos to ASE Charters, Inc, 19316 Harvest on April 26, 1993.
3. An application for workers's compensation insurance for ASE Charters, dated November 1, 1990 which identifies its business as a limousine service.
4. A Workers Compensation Insurance Payroll Report for ASE Charters for the period from November 2, 1990 to April 1, 1991.
5. An application for workers' compensation insurance for ASE Charters, Inc., dated April 27, 1993 which identifies its work as "Parcel Delivery Co." and "Clerical" and indicated that its prior coverage expired on July 1, 1991.
6. A Risk Evaluation Questionnaire and Addendum concerning workers' compensation insurance, dated February 1, 1994, in which it was indicated that prior coverage had not been renewed because "owner decided to do the job by himself." The Alien was identified in this filing as one of the principals involved in the ownership or operation of the business. It was reported further that the business operated as a "shuttle and trucking" and had three full-time employees with estimated annual compensation of \$12,000.00 each.

7. A copy showing the issuance of commercial transportation insurance to ASE Charters, Inc. in January 1994.
8. A copy of a "Service Agreement", dated April 7, 1992, between Pacific Office Centers and ASE Charters at 3350 Shelby Street, Suite 200 in which the vendor agreed to furnish telephone answering; mail services; a conference room available from 8:00 a.m. to 5:00 p.m., weekdays; Xerox copying at \$.10 per copy; facsimile machine at a specified rate; and secretarial services at \$18.00 per hour.
9. A Directory Listing Request, dated February 9, 1994 for a listing of ASE Charters, 3550 Shelby, under the heading of "Transportation" for the Ontario Directory of GTE California.
10. A Quarterly Contribution Return for the quarter ending March 31, 1993, which shows that the Employer paid five employees salaries totaling \$14,964 during this period. This included \$3,000.00 paid to the Alien.
11. A Certificate of Mailing showing that a piece of ordinary mail addressed to Bruce E. Palmore, had been received by the U.S. Postal Service from the Employer on September 14, 1993.
12. Copies of letters addressed to Stephenson, Do and Hatala, with Certificates of Mailing showing that they were posted on January 29, 1994. The letters invited them to come for interviews on February 4, 1994, "[w]ith reference to [their] application for a position with this company."

The Employer's rebuttal included further the following Declaration of Liza Eleazar:

- "1. I am the President and Chief Executive Officer of ASE Charters, Inc., a California Corporation;
2. ASE Charters Inc. started business in 1987 as a sole proprietorship owned by Antonio S. Eleazar;
3. ASE Charters, Inc. is engaged in the business of charter transportation service and public livery. When it started in 1987, its office was based at 19316 Harvest Avenue, Cerritos, CA. 90701. Although the address is a residential address, we had obtained a business license and utilized approximately 1,200 sq. ft. of the property for our business;
4. ASE Charters Inc. became incorporated in July 1992 and continued operating the business at 19316 Harvest Avenue, Cerritos, CA 90701

5. Business was better prior to 1992 and it had 9-10 workers and maintained workmen's compensation insurance. However, in 1992, the business suffered a serious decline and we could not afford the workmen's compensation insurance required by law. It was then that we decided to base our operations out of Los Angeles county and move into the San Bernardino county area.

6. In 1992 we rented an office space at 3350 Shelby Street, Ontario, CA. 91764 where we intended to eventually relocate our corporate office and move our entire operations there. However, we have to maintain our Cerritos office address because of the name and address recognition that we already built over the last 5 years of operations. Thus, when we filed our labor certification petition, we actually intended to have the job site in San Bernardino in anticipation of our final relocation to that address;

7. When the resumes of the applicants came in from the recruitment effort, our business was suffering a serious and pressing problems with the insurance requirement of the Public Utilities Commission and I was in the middle of negotiations to work out compliance with the PUC regulations. Our problem was so serious that we had been seriously considering going out of business. Additionally, I was the only senior officer at that time who can conduct the evaluation and interview applicants. My other senior manager was out of the country on company business;

8. I received several resumes at different times and I did not set up interviews immediately because I can not afford the time to do different interviews at different times. I instructed my secretary to set up the interviews for just 1 or 2 days when all the resumes have been sent in;

9. I received the last batch of resumes on or about August 17, 1993 and I did not realize until 2 weeks later that those will be the last batch. It was only then that I went over each resume and prepared the interview appointments. It was also at this time that I was single-handedly dealing with our PUC problems. As much as I wanted to conduct the interview sooner, I could not put priority to it and jeopardize my other business commitments which at that time meant the very survival of the business. I tried my best to conform to the Job Service office recruitment requirements and considering my extreme hardship that I was undergoing at the time, I believe that I have exerted my best good faith efforts to comply;

I declare under penalty of perjury that the above representations are true and correct."

Finally, the rebuttal included a statement from Employer's counsel reiterating the reasons

for the rejection of applicants set forth in the recruitment report.

The CO denied certification in a Final Determination issued on May 2, 1994. The CO noted the Employer's statement that the business was suffering "serious and pressing problems" and that they had been considering going out of business and concluded that the evidence shows that the Employer does not have a job opportunity clearly open to any qualified U.S. worker. The CO concluded also that the Employer had not rebutted the issues raised in the NOF concerning the rejection of U.S. applicants and failed to promptly contact U.S. workers.

A Motion for Reconsideration was filed by the Employer with the CO on June 7, 1994. The Employer contended therein that the Final Determination was based on incomplete, inadvertent, arbitrary and conclusory findings and contained mis-characterization and misinterpretation of the Employer's arguments and evidence. Appended thereto were copies of a Workers' Compensation policy issued to the Employer on May 4, 1994 at an estimated annual premium of \$3,274.00; a copy of the Employer's 1993 tax return showing a net income of \$2,877.00; and the Employer's EDD returns for the quarters ending June 30, 1993, December 31, 1993 and March 31, 1994 showing that the Alien was paid salaries of \$3,000.00, \$4,426.00 and \$7,275.00, respectively. Each of these documents show the Employer's address as 19316 Harvest Avenue, Cerritos, California.

The CO denied the Motion for Reconsideration as it did not raise issues which could not have been addressed in the rebuttal. He then forwarded the records in this case to the Board. Thereafter, the Board ascertained that the Employer desired an administrative-judicial review of the denial of certification and the matter is considered to be before the Board for such purpose.

DISCUSSION

I. Existence of a Current Job Opportunity

Section 656.50 of the regulations defines an "employer" as:

"..a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment and which proposes to employ a **full-time worker at a place within the United States...**"

(Emphasis added)

The CO, in his NOF in this case, cited this regulation and questioned whether there was a **current job opening or ongoing business** to which U.S. workers can be referred. In his Final Determination, the CO concluded only that the Employer had not established the existence of a job opportunity. Thus, in effect, he acknowledged that the Employer is an ongoing business and we agree that the evidence of record supports such a finding.

The Employer contends that the CO has misconstrued its president's rebuttal statement and has ignored its other evidence. Although the CO focused on the representations of the Employer's president regarding business difficulties the firm was experiencing, we find that even considering the other evidence submitted both with the rebuttal and request for reconsideration there is ample support for his ultimate finding that the Employer has not established the existence of a realistic job opportunity.

First of all, there is the issue of "location within the United States to which U.S. workers may be **referred for employment.**" The Employer maintains that they have opened an office at the Shelby Street address to which they intended to move their operation. However, the evidence which purportedly establishes such intent shows that the Employer has not obtained any office space at this address where U.S. employees can be employed. They have merely obtained certain business services and the use of a conference room.¹

Then there is the issue of whether the Employer's job opportunity involves **full-time** employment. It appears from EDD records that the Alien had been working at 3 jobs at the time the Employer filed the application. This, coupled with the fact that she was only being paid \$1,000.00 per month by the Employer at this time, supports a finding that she was only working part-time for the Employer. It appears from the financial data submitted that the Employer's financial management needs were being met by such part-time work.

Finally, the evidence submitted shows that the Employer is not prepared to pay a salary of \$48,000.00 as represented in its amended ETA 750A. It was paying the Alien a mere one-fourth of this amount at the time of its application and even if we were to consider its most recently submitted EDD report, her salary on an annual basis (i.e., \$29,100) still falls \$19,800.00 short of the prevailing wage. Additionally, the corporation lost money in 1992 and it appears that it would not have made its modest profit in 1993 had it undertaken the expense of protecting its employees with workers' compensation insurance. Thus, the existence of a job opportunity at a prevailing wage of \$48,000 at 3350 Shelby Street in Ontario, California is by no means established in this case.

II. Bona-Fide Effort to Recruit

The Board has held that implicit in the certification process is the requirement that an employer show that it has made a "good faith" effort to recruit qualified U.S. workers for the job opportunity. *See, H.C. LaMarche Enterprises, Inc.*, 87-INA-607 (Oct. 27, 1988). In applying this principle, the Board has held also that an employer's failure to timely contact U.S. applicants indicates a lack of good-faith recruiting. *Londa Linda Foods, Inc.*, 89-INA-289 (Nov. 26, 1991). It has been held further that an employer must give U.S. workers adequate time to respond to the employer's contact concerning interviews. *Tempco Engineering, Inc.* 88-INA-101 (June 20,

¹We note that the letterhead used by the Employer to correspond with the Board on May 31, 1995 no longer includes the Shelby Road address but shows only the Harvest Avenue one.

1988).

Although the Employer's letter inviting U.S. applicants for an interview was dated July 20, 1993, the certificate of mailing pertaining to one of these letters indicate that they were not posted until September 14, 1993. This is some 7 weeks after the first of the resumes were forwarded and demonstrates a lack of effort to timely contact at least the initial 12 applicants.² Furthermore, scheduling interviews within only 3 days of the mailing of the letters, shows a further lack of good-faith recruiting.

We are not convinced by the excuses provided by the Employer's president for the delay. The Board has previously held an employer's explanation for a delay of 5-6 weeks to be inadequate when it was based on its wanting to wait to receive all resumes before initiating contact. *Baccarat Restaurant*, 93-INA-465 (Jun. 13, 1994). Neither is a delay because of other business concerns necessarily a valid excuse for failing to contact applicants on a timely basis. See, e.g., *Bobby McGee's*, 91-INA-39 (April 15, 1992). We note also that there is no indication that the Employer's business is international in scope. Consequently, the explanation that the only other person who could interview was out of the country on company business is likewise unacceptable.

The Employer has offered no documentation, such as return mail receipts, to establish that applicants Stephenson, Do and Hatala received their appointment letters prior to the date set for their initial interviews and the Employer's attempt to reschedule interviews after the issuance of the NOF does not cure the initial violation. *Flushing Auto Service Corp.*, 93-INA-204 (June 5, 1994). Accordingly, the CO was correct also in denying certification on the basis of the Employer's failure to recruit in good-faith.

As certification was properly denied on the two aforementioned bases, it serves no useful purpose to take up the remaining issue as to whether U.S. applicants had been properly rejected for the position.

ORDER

²We recognize that there may have been some delay in the Employer's receipt of these resumes due to its having used an inaccurate address in its ETA 750(A). However, the Employer does not contend that this contributed to its delay.

The Certifying Officer's DENIAL of certification in this case is AFFIRMED.

Entered at the direction of the panel

Todd R. Smyth
Secretary to the Board of Alien
Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a part petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative :Law Judges
Board of Alien Certification Appeals
800 K Street, N.W., Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.